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Health and Harmony Consultation Paper Defra

This evidence is written by Dr Ludivine Petetin from Cardiff University and Dr Mary Dobbs, from Queen's University Belfast. Both Ludivine Petetin and Mary Dobbs are Lecturers in Law with expertise in agri-environmental issues who have been engaging with stakeholders in Wales and Northern Ireland respectively on the impact of Brexit. They are currently writing a book on Brexit and Agriculture.

1. On first blush, the consultation paper seems to support a truly green, productive and holistic agricultural policy – one that also provides value for money and promotes economically viable farming. However, on closer inspection a range of issues arise in practice. The ones highlighted herein relate to: (I) the removal of the Basic Payment Scheme; (II) the concept of ‘public money for public goods’; (III) environmental imbalances; (IV) devolution; and (V) trade.

(I) Removal of Basic Payment Scheme/direct payments and the impact on small farms

2. The consultation paper proposes to reduce BPS payments during the transitional period and then to remove these entirely after the transitional period. Therefore, BPS will disappear in England at least by c. 2025 (the paper does not dictate any such approach for the devolved regions but may nonetheless influence regional approaches for instance due to trade policy, lack of a regional approach and control of purse strings).
3. Whilst the proposed policy provides for continuation of support through other mechanisms, most farmers and their advisers are not (fully) aware that BPS will shortly disappear. As a result of the miscommunication arising from the Health and Harmony Consultation Paper, there is a danger that farmers will not be given enough time to adjust to the changes that will be required of them for them to be profitable enough when BPS are removed. The Government/DEFRA should better communicate its policy plans to remove BPS to farmers (and the availability of alternative support) in order to enable farmers to prepare for the upcoming changes.
4. With appropriate communication, the proposed focus on increased productivity and furthering this through for instance technological innovation would allow farms – on average – to remain profitable after the abolition of CAP payments. The policy promotes productivity for farmers through using targeted inputs more efficiently, investing more efficiently and diversification.
5. However, some farms which are currently struggling – even with direct payments coming from the EU – will find the change in the support system particularly difficult. Many UK farms are currently profitable solely because of direct payments coming from the Common Agricultural Policy (CAP). A good rule of thumb is that direct payments pay the rent.
6. If DEFRA perseveres with such a radical change in agricultural policy that will only support ‘income foregone’ interpreted in a strict manner, it is likely that the

bottom 25% of farms that currently struggle or only survive because of the receipt of BPS will disappear. The 50% of farmers in the middle will succeed in moving away from direct payments to environmental payments as they become more profitable. The top 25% will barely feel the change in policy since they are already successful. (see comments made by Ludivine Petetin at the Game and Wildlife Conservation Trust All-Party Parliamentary Group in March 2018, <https://www.gwct.org.uk/policy/appg/march-2018/>; in the Farmers Guardian, <https://www.fginsight.com/news/news/defra-makes-decision-to-let-quarter-of-uk-farms-disappear-57116>; and in UK Business Insider; <http://uk.businessinsider.com/quarter-english-farms-bankrupt-after-brexit-2018-4>)

7. Protection of small farms is significant for multiple reasons, tied to the multifunctional nature of agriculture. They contribute in rural areas to the culture, society, economy (including directly through farming and tourism) and environment. Although ensuing a ‘level of farm income’ is not an objective of the consultation paper,¹ the value of small farms is noted in the consultation paper in the context of uplands – with suggestions that they may merit further protection. From an environmental perspective, small farms or considerable variations and patchy farms are fundamental to the development and maintenance of biodiversity – including genetic diversity of crops. Productivity is important to resilience of farming, but this diversity is fundamental to agri-sustainability, environmental sustainability and food security – including on a national and global level.
8. Protection may be possible via other financial mechanisms. Thus, the idea of ‘public money for public goods’ noted below could provide a mechanism to fund these smaller farms through linking in to their contributions within rural communities and the environment. Arguably their nature merits further financial support through contributing to the maintenance of public goods. However, this would require the public goods to be interpreted liberally (see below). Further, there is the potential for funding through a rural development fund, but as noted below there is currently very limited support/focus in the consultation paper for this. Again, rural development should continue to be supported to avoid growing discrepancies within the country and to ensure a decent standard of living in rural communities.
9. This scenario could be worse in the other regions of the UK since they rely more heavily on CAP support. For instance, in Northern Ireland approximately 4/5 of farms are considered to be ‘very small’ (DAERA, 2018, p. 41). These are not economically viable without considerable financial support – currently provided for via CAP (directly and indirectly). The nature of NI does not facilitate large scale farming as one might find in England. Yet, once supported, the agri-food industry is a significance source of employment and foundation for much of the economy in NI. If the farmers did not continue as is, this would have considerable negative knock-on effects in NI. The situation is further complicated by the physical border with the Republic of Ireland and the interconnected nature of the supply chain on the island (Dobbs, McGowan, Melo Araujo, & Gravey, 2017).

¹ Prof Alan Matthews, March 2018 <http://capreform.eu/a-tale-of-two-policy-documents-defra-vs-commission-communication/>

10. It should also be noted that the aim of reducing the direct payments and introducing caps is to facilitate developing the capacity of farmers to adjust to the changes, i.e. financial savings will be needed and are being sought. However, as there are already caps in the other devolved regions (Gravey, Burns, & Jordan, 2016), large cuts would therefore be required to save any money and most farms will not survive any cuts. In other words, such an approach would be self-defeating in the other regions. Yet, without financial support from Westminster, continuation of BPS may not be feasible even into the transitional period.

(II) 'Public money for public goods'

11. Part of the current Green Brexit drive aims to modify the support farmers receive for the farming activities they undertake. Focus on 'public money for public goods' is under development within DEFRA. The expression 'public money for public goods' in agriculture is not new. It has existed in EU CAP documents since the 1990s and is not a concept created by DEFRA.
12. A public good is often defined as 'a good or service in which the benefit received by any one party does not diminish the availability of the benefits to others, and where access to the good cannot be restricted' – see for instance the 2011 UK National Ecosystem Assessment report. Clean air, soil water storage (yielding flood control), beautiful views over a landscape and rural vitality are often cited as examples of such public goods.
13. The term public goods utilised by DEFRA in the Command Paper does not accurately reflect the environmental outcome-based payments the government wants to create for three main reasons. First, it is often understood by stakeholders that public goods are tangible goods that are the results of processes of production or manufacture whilst most public goods are intangible. Second, the term leads to complexity when the benefits of production of marketed goods are privatised (food) and non-marketed services (including good environmental land management) are encompassed under the term. And, third, to put it simply, public goods tend to be 'services or goods not rewarded by the market'. However, when reading the consultation, productivity appears to be identified as a public good (Consultation Paper p. 34). Supporting farmers to increase their productivity does not sit well within the new paradigm for payments for ecosystem services (PES). Productivity aims to create a more efficient and effective agriculture that can result in greater economic success. Ultimately, this success would be rewarded by the market. Misunderstanding would diminish if the terms utilised were instead environmental benefits/outcomes or ecosystem services. These terms should have been preferred since they better reflect the ongoing momentum towards agri-sustainability and the goal of supporting farmers to deliver environmental outcomes and ecosystem services.
14. Further, this emphasis on 'public goods for public money' or PES means a lesser focus on rural development. The Consultation Paper does not seem to focus on rural communities/rural vitality/rural employment contrary to what currently exists under Pillar 2 of the CAP. Further, it does not embrace a comprehensive and holistic approach to agriculture. The Consultation Paper appears to uphold the stigma that rural areas are perceived as 'left behind' places and should become more like urban areas to become more attractive and to develop economically. This perspective has

often been the position of the UK government approach towards rural areas. Rural areas and their communities are not viewed for the intrinsic values, goods and services they create. This new focus on PES could change this approach and lead to a regeneration of rural areas and their thriving communities. This can be achieved if support is targeted towards four main characteristics and features of rural development: to provide employment; to generate economic activity related to farming; to maintain economic viability and sustainable vitality in remote areas; and to provide environmental and cultural amenities.

15. Crucially, food production and food security are not identified as public goods or as central pillars of the Consultation Paper. There are clear dangers with such an approach. To solely focus on the delivery of environmental outcomes by farmers and to support farmers to remove cattle, lamb and other livestock from production would negatively impact on levels of food production. It must be considered whether increased productivity of economically viable farms will compensate for the cessation of farming activities elsewhere in the UK. The moral acceptability of financing programmes that diminish food production will need strong justification to stand public criticism at times of food insecurity. This issue is increasingly complicated due to the potential impact of trade agreements and the role of tariffs – will Brexit for instance lead to the availability of cheap, low quality produce or increase the cost of food on the market? It should be borne in mind that two of the objectives of CAP are to provide a fair standard of living for farmers and to provide reasonably priced goods for consumers – the direct payments are partially aimed at securing this.

(III) Environmental Imbalances

16. Despite referring to a ‘Green Brexit’ and numerous statements indicating that the English agricultural policy will be environmentally friendly, there are numerous points of concern within the consultation document.
17. In considering the direct payments and also reform of CAP, suggestions can be seen to remove/reduce cross-compliance requirements, greening criteria and evidential requirements. There is discussion of regulatory burdens and the need to reduce and simplify these. This is worrying as, whilst some may be excessive, in general the regulations are there to incentivise environmentally-friendly behaviour. Flaws exist, but these could be addressed through developing and reforming the approach, rather than discarding the approach entirely – it seems to be very much a case of throwing the baby out with the bathwater.
18. Linked to this, whilst the proposed agri-environmental schemes discussed below are positive to see, they tend to be individual projects rather than taking a holistic approach. This risks a silo-ed or piecemeal approach that does not reflect the nature of the environment, with permeable boundaries and the potential for an activity to pollute multiple environmental media or come from numerous sources. Hence we see integrated approaches in the Industrial Emissions Directive (heavily influenced originally by UK legislation on integrated pollution control), Natura 2000 Networks for conservation, and on-going attempts to address diffuse water pollution.

19. Whilst separate legislation can and should regulate these areas, the potential substantial positive or negative impacts agriculture can have on the environment means that having mutually supportive policies is essential. CAP, although flawed, has evolved to promote compliance and overall environmentally friendly behaviour. Post-Brexit, it is essential that agricultural policy/policies across the UK promote environmental protection in a holistic fashion and avoids reverting to historical, siloed and reactive approaches.
20. The proposed environmental schemes are to focus on creating new environmental outcomes and services, rather than also maintaining and advancing existing features, landscapes and services. This 'greening' of payments aims at improving environmental management in the farmed countryside and enhancing environmental benefits appears crucial. Farmers must be paid to maintain and advance the positive environmental outcomes/services they create/have created. Receiving support should **not** only be about creating new outcomes/services. When reading the Consultation Paper, it appears that only the latter will be rewarded. This is a huge worry since enhancing environmental benefits is critical to create strong buffer zones, stepping stones and wildlife corridors. Ecological and natural connections are needed between existing sites to build a resilient network with green corridors.
21. Further, active management practices from farmers and land-owners rather than passive reaction to changes should be the driver of future policy.
22. The more targeted an Environmental Land Management Scheme Contract is, the better the outcome will be for the environment. However, such targeted approaches will constrain all parties to the agreement as well as being quite resource intensive. It is crucial therefore to ensure that such schemes are well-thought out, suitably tailored and appropriately rewarded.
23. If there are too many practical or financial constraints under the new contracts then it will result in low uptake from farmers – this may be because it involves requiring farmers to farm in a manner contrary to their inclination or desires (e.g. changing from a cattle to dairy or pig farmer), it is infeasible for the size, location or quality of their farm or because it is simply economically unviable.
24. The financial support during the transitional period and the schemes themselves are intended to facilitate changes in farming practices that will accord with these schemes. However, the current proposals indicate a focus on achieving environmental outcomes. Whilst obviously desirable, having a scheme that only rewards outcomes risks putting farmers off making the initial costly changes – essentially if the environmentally friendly behaviour is guaranteed to be costly but the substantial rewards may not materialise, why would farmers take the risk? Consequently, one variation of this in environmental governance is to avail of rewards focussed on procedures/steps, as well as on outcomes. This would provide some security to farmers provided that they could establish that they took X steps in such and such a manner. Further rewards could also be provided on achievement of milestones. Such rewards should bear in mind the level of costs involved for farmers, as well as the societal benefits of the various outcomes at all stages.

25. Further, any such schemes need to provide some long-term certainty for farmers and for environmental protection. Farmers cannot work on short time spans, but need to determine what investments are worthwhile and will guarantee financial reward. If the policy might change in the meantime, then there is no point in investing. Hence, a group of Welsh farmers suggested a period of 30 years or longer for establishing a policy.² However, the nature of parliamentary sovereignty and the potential for governments (new or current) to change policy and law makes it questionable whether any government can truly guarantee the longevity of such schemes.
26. In this regard, it should also be borne in mind that some farms may struggle more to make capital investments, may not be able to risk diversify through growing multiple crops/engaging in other economic activities and also may not be able to survive economically if they do not receive a regular income year-in, year-out. In other words, once again, small, less-profitable farms will be worst hit if the schemes are not suitably tailored.
27. When considering environmental protection, the Consultation Paper is very similar to the 25 Year Environmental Plan rather than a bill. It sounds more aspirational and lacks a real drive towards actual change and establishing relevant tools and mechanisms to deliver agri-sustainability.
28. A very worrying feature, alongside the simplification of procedures and regulations, is the proposal to reduce, remove and improve inspections. Trust is a wonderful trait, but farming is an economic activity and environmental compliance can be costly – non-compliance may make financial sense in a regulatory vacuum. The use of incentives and deterrents are both valuable tools to encourage compliance (Becker 1968; Abbot, 2009; Brennan, 2016) and softer mechanisms, including some self-monitoring can play a useful role (Macrory, 2006), but at the end of the day agricultural producers are not ‘customers’ and we should not rely heavily on self-regulation or self-monitoring. Claiming that the current regimes are not effective is not a reason to scrap them – numerous reasons can exist for their limited effectiveness, including the lack of sufficient resources.
29. Self-monitoring, individually or in the context of a group scheme/organisation, might be valuable as a complementary mechanism – encouraging whistle-blowing and reporting by the public may also assist, but the role of independent, expert monitoring is fundamental to environmental regulation and therefore to ensure compliance also with agri-environmental schemes.
30. Similarly, suggestions of reducing penalties and trying to avoid holding farmers liable for environmental offences should not be adopted lightly. Penalties tend to be on the lower end of what is provided for in the legislation, if anything is imposed at all. A few exceptional cases make the headlines, but these typically are ones involving waste where the defendants have made considerable sums by breaching environmental law. Nor should it be cast at the door of the EU that the penalties are

² Jane Ricketts Hein, Eifiona Thomas Lane and Arfon Williams, The Future of the Welsh Uplands after the Common Agricultural Policy : Stakeholder Policy Priorities, May 2017, <https://uplandsalliance.files.wordpress.com/2017/06/future-of-the-uplands-post-cap-report-final.pdf>

disproportionate or unfair. The EU provides great flexibility to Member States to provide for environmental offences and penalties, provided that they are ‘effective, proportionate and dissuasive’. The policy and legislative regime should maintain this approach, in order to facilitate an effective deterrent – flexibility can be built in through considerations of ‘fault’ or defences, as well as through the numerous stages environmental actions go through before leading to a prosecution.

(IV) Devolution

31. The Health and Harmony Consultation Paper barely touches upon devolution. Agriculture and environmental protection are devolved competences according to the devolved settlements. Four different agricultural policies across the UK could be adopted with different schemes established across the devolved regions. It is likely that the design of a new agricultural policy in Wales will be driven by the ‘sustainable management of natural resources’ and its holistic and value-driven approach to environmental protection, as enshrined in its legislative framework – notably the Well-being of Future Generations (Wales) Act 2015 and the Environment (Wales) Act 2016.
32. The absence of the principle of subsidiarity can be felt within the Consultation Paper where it is replaced by the principle of commonality, which is now at the centre of UK Government policies. This modification in the framing of policies away from the regions (with subsidiarity) towards the centre (with commonality) forces the regions to conform to the will of the centre rather than formulating their own policies. This radical change could be detrimental to the devolved administrations and their powers and could place them at a disadvantage with a lack of input into UK-wide policies. In the long term, this reversal in the framing of policies and in principles will negatively impact the rights that the devolved regions had under EU law (Engel and Petetin, 2018).
33. The implications of the Wales and Scotland EU Continuity Bills need to be considered in detail as well as the impact of the Common Framework Document.
34. Regarding the common frameworks, it is worth noting that the regional administrations so far have identified several points relevant to agriculture that are thought to require a common framework. The same is not true for environmental protection, with some issues considered to require no common framework (including water quality). This is unfortunate as the two areas are so closely linked, that productive discussions between all four regions are required to develop effective policies. Whilst the areas are devolved and all four can go their own route, some basic standards, principles and cooperative procedures should be set and maintained, as well as providing for issues regarding cross-boundary impacts.
35. In the context of agricultural policy, the English agricultural policy could impact significantly upon other regional agricultural policies – as the default if the regions do not act (e.g. in Northern Ireland due to no government in Stormont), in contributing to the common frameworks that are relevant (depending on the role of each region in developing the common frameworks, the pre-existence of an English policy could play a considerable role), simply from being a physically neighbouring piece of land

(since nature is permeable) and where the farmers are typically competing in the same markets.

36. Further, the allocation of funds for agricultural support across the four nations of the UK will impact on the design of agricultural policies in the devolved administrations. The justification of costs to Treasury will most likely be based on some kind of 'public money for public goods' formula. But any new fund and programme created should allow for some differences and disparities within the UK. However, the question must be asked as to whether any new established formula would reflect the geographical, topographical and economic differences across the devolved administrations. These differences and the broader context within which farming in the four regions operate highlight 'the need for differentiating policies within the UK—reflecting both the existing practices of subsidiarity and devolution' (Gravey & Dobbs, 2018).

(V) The WTO Agreement on Agriculture and the future of agricultural support in the UK

37. Since the establishment of the Agreement on Agriculture, a conservative interpretation of 'income foregone' under Annex 2 for environmental programmes has been adopted by the EU. However, what is the baseline for measuring support? What do we measure? How do we measure it? The text of the Agreement on Agriculture is silent on these factors. The counterfactuals are unknown. Thus, there is no reason why the UK should adopt a strict interpretation. The strict interpretation adopted by the EU does not set a precedent. Further, income foregone focuses on financial and economic incomes not environmental outcomes.
38. The immediate notification of payment for ecosystem services post-Brexit under the green box could negatively impact on the UK if the schemes are not consistent with the criteria under the green box. Other countries could seize the opportunity to challenge these schemes in front of the WTO to set a precedent against the (ab?)use by powerful countries of the green box. Keeping the support under the amber box for a short period of time whilst transitioning from area/land-based payments to ecosystem/environmental services payments would allow for the new schemes to be tested and framed in compatibility with the green box in the long term.
39. Relying on the amber box for a transition period only (rather than indefinitely) would be more politically acceptable to WTO members who do not benefit from the AMS. Thus, the amber box could provide a pathway for transition from area/land-based payments to environmental outcome-based payments. In the long term, the green box provides the best opportunity to secure WTO compatibility for UK domestic support post-Brexit - but only to the extent that payments are not restricted to 'income foregone' interpreted in a strict manner (see comments made by Ludivine Petetin at the Game and Wildlife Conservation Trust All-Party Parliamentary Group in March 2018, <https://www.gwct.org.uk/policy/appg/march-2018/>).
40. Further, UK farmers are protected by EU tariffs. Once the UK is removed from this protective bubble, UK farmers will be subject to price volatility in world markets

where the price of commodities changes on a daily basis. Post-Brexit UK farmers are going to have to compete on the world scene and it is going to be a very harsh environment for them.

41. Trade policy should be clearer before the Agricultural Policy is designed. However, the difficulty is that both policies need to be developed in collaboration with each other – as both will and should influence the other. Overall, UK trade policy should support UK agricultural policy. Similarly, it is essential that a clearer environmental policy be developed, with substantive goals and principles, which should likewise inform and support UK agricultural policy – and vice versa.
42. Overall, the Consultation Paper varies in approach and quality. There is next to nothing regarding devolution and the significance for regions other than England. When it comes to environmental protection, it sounds more aspirational and lacks a real drive towards actual change and establishing relevant tools and mechanisms to deliver agri-sustainability. Some greater specificity is found when considering the role of technology or developing competitive approaches, and even more precise again when considering how to simplify regulation or reduce the payments from the BPS.

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